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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1564

ROBERT LEE BLEVINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. I) is reported at 436 F. 2d 1385.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1971, and a petition for rehearing was denied on March 9, 1971 (Pet. App. II). The petition for a writ of certiorari was filed on April 9, 1971, and is out of time under Rule 22(2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction of a conspiracy violation under 18 U.S.C. 371 was improper because

hearsay evidence of acts of co-conspirators was admitted or because the scheme involved allegedly unrelated transactions.

2. Whether petitioner's conviction was improper because some overt acts occurred outside the United States and involved foreign nationals.

3. Whether the district court correctly instructed the jury with regard to the proof necessary for conviction.

4. Whether petitioner was denied his right to a speedy trial.

5. Whether 18 U.S.C. 2314 was correctly charged and applied in this case.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy (18 U.S.C. 371) to violate 18 U.S.C. 1343 (fraud by wire) and 18 U.S.C. 2314 (fraud by use of interstate facilities), and another count charging a substantive violation of 18 U.S.C. 2314. He received concurrent four year prison sentences and was fined $5,000 on each count (II R. 475).[1] The court of appeals affirmed *per curiam*. (Pet. App. I).

In general, the evidence showed that petitioner was a key figure in an elaborate scheme to defraud specu-

[1] The various documents and transcripts comprising the ten volume transcript of the record on file in this Court have not been repaginated consecutively from beginning to end. "R.", preceded by a volume number and followed by a page number, refers to volumes one through five; "Tr.", followed by a page number, refers to the transcript of testimony contained in volumes six through ten.

lators in platinum. The conspirators offered to sell to their victims platinum, supposedly located in Mexico, at prices substantially below the market. They then demanded from the victims large sums of money as advance payments, purportedly to cover the cost of "export permits" and other necessary expenses connected with removing the platinum from Mexico. The "permits" were never obtained and each deal fell through in a similar fashion, with petitioner and his confederates retaining the advance payments.

1. In February 1967, petitioner agreed to sell to Morris Jacobs and Daniel Daniels fifty thousand ounces of platinum supposedly located in Mexico. The agreement included arrangements for two co-indictees, Norman Natividad and Vincent Varela-Lores ("Varela"), to obtain permits and licenses to transport the platinum from Mexico to Europe and to provide transportation. Petitioner asked Jacobs and Daniels for $80,000 to pay for these items (Tr. 635–639).

During late March or April of 1967, the parties met at Natividad's house in Tijuana, Mexico and decided that a bar of platinum would be provided as security for the advance payment from Jacobs and Daniels (Tr. 639–640). Later in April, petitioner again conferred with Jacobs concerning the transaction, this time in San Diego (Tr. 640–642). In June or July of 1967, $20,000 in cash was paid towards the advance; petitioner then agreed to complete the transaction if Jacobs and Daniels would provide another $20,000. This payment was made about a week later,[2] and

[2] Both $20,000 payments were made in Tijuana.

Jacobs was promised the "security"—the bar of platinum—within three days (Tr. 643–645, 732–733).

Natividad called Jacobs a few days thereafter, and advised that the bar of platinum would be delivered in Guadalajara, Mexico. Daniels accompanied Natividad there (Tr. 646–647). Upon arriving, both men were jailed, according to Natividad, by the "federales." Natividad told Daniels that petitioner and Varela, whom they later saw and were asked to identify, had also been arrested. A purported "deal" for their release on payment of $1,000 was arranged by Natividad with the "federales". Daniels refused Natividad's request for part of this pay-off (Tr. 708–710).

Several months later petitioner telephoned Jacobs that the platinum had been confiscated by the Mexican government. Jacobs and Daniels met in Mexico with petitioner and Varela, who claimed that authorities had jailed and beaten them at Guadalajara. They reported they were trying to reclaim the platinum "through people they knew" and asked for an additional expense advance, which was refused (Tr. 647–649). The dealings then terminated.

2. On January 15, 1968, one Hartley Bell, a Canadian, met at Natividad's house in Tijuana with petitioner, Natividad, and Varela, and agreed to purchase thirty-four thousand ounces of platinum from petitioner (Tr. 496–506). Natividad and another coindictee, Telford, telephoned Bell on May 21. Bell withdrew $60,000 from the Bank of America in San Diego fol-

lowing the telephone call, and the next day delivered it to Natividad, petitioner, and Varela for permits to export the platinum from Mexico. In return, Bell received a contract and a $60,000 check drawn by petitioner. (Tr. 509, 512).

On May 29, Bell and Natividad traveled to Mexico City to get two bars of platinum (Tr. 513–514). There they were arrested and jailed by "federal agents." Varela and petitioner were also at the jail, in another cell. After several hours, Bell and petitioner were released and Bell returned to Los Angeles (Tr. 515–516). Bell did not receive the permits or any platinum, and petitioner's check was returned because of insufficient funds (Tr. 512–513).

3. In April of 1968, one Henry Williams, having traveled from New York to California, met at Natividad's house with Natividad, petitioner, and one "Vince" (Tr. 573). Petitioner claimed that he had connections throughout Mexico and with the Mexican government, and told Williams he would sell him forty thousand ounces of platinum (Tr. 573–574). Petitioner disagreed with the terms proposed by Williams and purportedly withdrew (Tr. 592–593).

Williams returned from New York to Tijuana on May 2 and met with Natividad and one "Juan". The three agreed to a platinum sale. Juan was to deliver the platinum to Williams at the Grant Hotel in San Diego, for which Williams would pay $100,000. Williams and Juan were then to take the platinum to be assayed for value (Tr. 576, 580). Williams, with his $100,000, met Juan as agreed at the hotel. Although petitioner supposedly was not involved, Williams saw him standing across from the hotel. After obtaining

the $100,000, Juan refused to deliver the platinum, threatened to kill Williams, and drove off with the money. Williams never received the platinum or a refund of the money (Tr. 581–588).[3]

4. In December 1967, one Mason met at Natividad's home with Natividad and petitioner to discuss Mason's interest in purchasing platinum (Tr. 548–551). Mason drove from Nevada to Tijuana on July 2, 1968, and again discussed a platinum purchase with petitioner, Natividad, Varela, and others. Petitioner agreed to sell forty thousand ounces of platinum to Mason's company, Tonopah-King, Inc. (Tr. 551–553).

Mason and his business associate, Warren Moore, returned to Natividad's house on November 18, 1968 (Tr. 555–558). Moore gave Natividad, Varela, and another co-indictee, Rodriguez, $120,000 for export permits (Tr. 556–558, 567); petitioner was not then present (Tr. 562). Four days later, Mason and Natividad were arrested in Mexico while waiting for Varela and others (Tr. 562–563). Mason and Moore never received the export permits.

ARGUMENT

1. Petitioner's principal contention concerns the admission of evidence "as to conversations between

[3] One of Williams' confederates, Goldman, was convicted for his activities following Williams' loss of the $100,000. He has filed a petition for a writ of certiorari in connection with that conviction, to which the government is presently preparing a response. *Goldman* v. *United States*, No. 1704, this Term. The conviction of Goldman's co-defendant, Catalano, is also pending on his petition for a writ of certiorari. *Catalano* v. *United States*, No. 1736, this Term.

alleged victims and unapprehended alien alleged co-conspirators" (Pet. 20). He challenges the recognized co-conspirator exception to the hearsay rule and attempts to distinguish his case from this Court's recent decision in *Dutton* v. *Evans,* 400 U.S. 74.

This contention is without substance. The evidence supporting petitioner's conviction concerns largely his own actions and representations. Evidence regarding statements made by his co-conspirators was admitted under the recognized rule that such statements are part of the execution of the conspiracy and have been impliedly authorized by the other parties to the scheme. This was entirely correct. See *Dutton* v. *Evans,* 400 U.S. 74, 81.[4]

Nor is there merit to petitioner's contention (Pet. 22–27) that the conspiracy charge (Count I) against him was invalid because it combined as a single conspiracy what were in fact multiple conspiracies involving different people, different subjects, and different substantive offenses. Petitioner and his immediate confederates, Natividad and Valera, were at the center of an elaborate scheme. The fact that they employed this scheme on several occasions and with different victims does not indicate multiple conspiracies or improper joinder. Since each transaction was part of "a single, over-all, comprehensive plan," the

[4] Petitioner asserts (Pet. 21–22) that this rule violates both the Fifth and the Sixth Amendments. This is not an acceptable proposition in view of this Court's declaration in *Dutton* v. *Evans*, *supra* (400 U.S. at 80), that "we do not question the validity of the coconspirator exception applied in the federal courts."

charge of a single conspiracy was correct. *Blumenthal* v. *United States*, 332 U.S. 539, 558. And the conspiracy was one crime, however diverse its objects, under 18 U.S.C. 371, which carries its own penalties; thus petitioner was in no way prejudiced because the conspiracy alleged violations of two substantive provisions (18 U.S.C. 1343 and 18 U.S.C. 2314) with differing penalties. See *Braverman* v. *United States*, 317 U.S. 49, 54.[5]

2. Petitioner contends (Pet. 33–39) that the courts below lacked jurisdiction because many of the overt

[5] Petitioner challenges his conspiracy conviction on two additional grounds. He argues (Pet. 23) that evidence as to events occurring in connection with the Mason-Moore transaction in November 1968—the $120,000 payment and Mason's arrest—was improperly admitted because the FBI had arrested him earlier in September. Although the FBI arrested petitioner in September, and indeed again in October (Tr. 816–817), he was presumably free on bond in November; the second arrest warrant states "* * * released on $5,000 P/S Bond. Was not committed" (IV R. 171). Moreover, even if petitioner was in jail in November, the November happenings were properly admitted since those events were merely the culmination of the overall conspiracy in which petitioner had participated from the bginning. See *United States* v. *Agueci*, 310 F. 2d 817, 839 (C.A. 2), certiorari denied, 372 U.S. 959. The *Sandez* case, on which petitioner relies (Pet. 23), involved statements made *after* the conspiracy had ended, and thus is readily distinguishable. The writ of certiorari in *Bostic* v. *United States*, No. 5250, this Term, on which petitioner also relies, was dismissed on May 24, 1971, as improvidently granted.

Petitioner also urges that prosecution of one for the substantive offense of conspiracy "makes him so vicariously liable for crimes committed by others" as to deprive him of a fair trial and of due process of law. This Court has never accepted this contention, as indicated by its decision in *Dutton* v. *Evans*, *supra*.

acts occurred outside the territorial jurisdiction of the United States and involved foreign nationals. But petitioner, a United States citizen, participated in a federal offense committed in part within the United States; in these circumstances, his case is well within the jurisdiction of the federal courts. See *United States* v. *Bowman,* 260 U.S. 94; *Charron* v. *United States,* 412 F. 2d 657, 659 (C.A. 9); *Brulay* v. *United States,* 383 F. 345, 349–350 (C.A. 9), certiorari denied, 389 U.S. 986; *United States* v. *Braverman,* 376 F. 2d 249, 251 (C.A. 2), certiorari denied, 389 U.S. 885; *Rivard* v. *United States,* 375 F. 2d 882, 885–888 (C.A. 5), certiorari denied *sub nom. Groleau* v. *United States,* 389 U.S. 884; *Ramey* v. *United States,* 230 F. 2d 171 (C.A. 5).

3. The trial court declined petitioner's request (see Pet. 40–44) to instruct the jury that since the government's case rested on circumstantial evidence, they must find that the circumstances were irreconcilable with any rational conclusion other than guilt in order to convict. As noted above, the evidence as to petitioner was primarily direct, not circumstantial. In any event, the court properly declined petitioner's request, in accordance with the "better rule." *Holland* v. *United States,* 348 U.S. 121, 139–140; see also *Sablan* v. *People of Territory of Guam,* 434 F. 2d 837, 839 (C.A. 9); *United States* v. *Nelson,* 419 F. 2d 1237, 1240–1241 (C.A. 9).

4. Petitioner claims (Pet. 44–45) that he was denied a speedy trial. He was first arrested on September 24, 1968 (Tr. 816), and the original indictment was filed

December 11, 1968 (V R. 1). On October 31, 1969, petitioner moved for trial on November 28, 1969, instead of the trial date then set, February 2, 1970. This request, while urging that petitioner was constitutionally entitled to a speedy trial, was principally grounded on his contention that he was entitled to be tried with another co-indictee, Christensen, whose trial had been severed by stipulation and set for trial on the November date (III R. 215–217). The prosecutor objected to a joint trial with Christensen (Tr. 285–286); and petitioner's counsel earlier conceded that his claim did not raise a "speedy trial problem in that as to all defendants there had been a waiver" (Tr. 283–284). The Christensen trial did not actually begin until January 12, 1970 (Tr. 346–347). Petitioner's trial commenced several weeks later, on February 9, 1970 (Tr. 389).

There is no occasion on this record to consider petitioner's assertion. Petitioner, though he claims prejudice, does not show any. In any event, the delay between indictment and trial of some fourteen months is not, on the facts of this case, unreasonable.

5. Count IV of the indictment charged that petitioner violated 18 U.S.C. 2314 by inducing Williams to travel in interstate commerce from New York to California. Petitioner contends (Pet. 45–47) that because paragraph two of 18 U.S.C. 2314—on which Count IV is based—refers only to "interstate commerce," while the other paragraphs of that section refer to "interstate or foreign commerce," there is confusion as to the proper scope of paragraph two. It is undisputed that the New York-to-California trip

did in fact take place,[6] and this provides the interstate basis for petitioner's conviction on Count IV. There is no need to consider petitioner's question in these circumstances, merely because foreign travel also was involved.[7]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

June 1971

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[6] Petitioner suggests (Pet. 46–47) that he was improperly convicted on Count IV because he was not involved in that transaction. But petitioner was involved at the beginning, and was seen by Williams when he met with Juan in San Diego to complete the deal (see p. 5, *supra*). From this the jury could properly infer that petitioner in fact remained a party to this transaction.

[7] Petitioner urges reversal on the ground that Williams stated in the presence of the jury that he had sought FBI protection from petitioner and his confederates (Pet. 25–26). Williams was allowed to stay in the courtroom for a few minutes after he testified because the FBI agent accompanying him had left and the prosecutor did not want him to leave alone (Tr. 619–620). However, the fact that Williams feared petitioner and his associates was brought out by petitioner's counsel on cross-examination (Tr. 596). In *Hall* v. *United States*, 419 F. 2d 582 (C.A. 5), on the other hand, the witness' fear of the defendant was asserted and repeatedly emphasized by the prosecution.

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PETITION FOR REHEARING

SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1970

NO. 70-119

ROBERT LEE BLEVINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

to the United States Court of Appeals

FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1970

NO. 70-119

ROBERT LEE BLEVINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING
OF ORDER DENYING CERTIORARI

to the United States Court of Appeals

FOR THE NINTH CIRCUIT

Petitioner respectfully moves this court for an order vacating its' order dated October 12, 1971 which denied certiorari, and that the court now grant certiorari.

The petition for certiorari previously filed herein presented the questions:

1. Important questions of Federal

conspiracy law referred to but not settled by Dutton v. Evans, 400 U. S. 74(1970) exist in this case and such issue is similar in nature to the one raised in Bostic v. United States, No. 5250, cert. granted, 39 L.W. 3297.

2. The co-conspirator exception to the hearsay rule should be declared by this court to be violative of amendment VI because it permits evidence to be introduced which is not subject to cross-examination and thus violative of due process under amendment V and thus involved an important question of Federal law which has not, but should be, settled by this court.

3. The Court of Appeals for the Ninth Circuit permitted an indictment to stand which charged in one count, multiple conspiracies composed of different groups of people which were concerned with different subject matter transactions which, if true, violated different statutes. This so far departed from the accepted and usual rules of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision.

4. The courts of appeals, not only in the ninth circuit in this case, but in all circuits in conspiracy cases have allowed the prosecution to develop a growing habit of using conspiracy indictments in lieu of a prosecution for the substantive offense itself or in addition to. Just as this court served notice on the policeman that he could not bottom his case on illegally obtained evidence or unlawfully extracted confessions, the prosecutor must be told that he cannot use the broad spectrum conspiracy indictment to bottom jurisdiction where it would otherwise not exist or to render obviously hearsay statements, otherwise inadmissible, permissible proof. These issues are on the appellate dockets in almost all, if not all, of

the circuits and should be disposed of.

5. The Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or so sanctioned such a departure by the lower courts insofar as extra-territorial reach of Federal criminal law is concerned as to call for an exercise of this court's power of supervision.

6. In California, where a specific intent is an essential element of the crime and proof of such intent rests entirely upon or substantially upon circumstantial evidence, the trial court must, on its' own motion, give an instruction on circumstantial evidence. Not to do so is reversible error per se.

7. The decision of the court of appeals insofar as it refused to consider the question of petitioner's denial of his right to a speedy trial is in conflict with the decision of the Supreme Court of Alaska.

Those issues were fully explored in the Petition.

Since filing and denial of that Petition for Certiorari, petitioner has discovered that United States Courts lack subject matter jurisdiction by virtue of the Mexican Extradition Treaty of 1899; and circumstances and events which developed in the course of the jury trial in the Superior Court of California for San Diego County entitled Nacos v. Blevins, Civil Action Number 306322. A copy of the original complaint in that action was printed as Appendix III(e) of the Petition at page xv. Petitioner testified at this civil action but did not do so at his criminal trial. The civil action resulted in a judgment in petitioner's favor.

I

ARTICLE III OF THE EXTRADITION TREATY OF 1899 BETWEEN THE UNITED STATES AND MEXICO SPECIFICALLY DEPRIVES UNITED STATES COURTS OF JURISDICTION OF THIS CASE.

Article III of the Extradition Treaty of 1899 between the United States and Mexico contains this proviso:

> "Each contracting party agrees not to assume jurisdiction in the punishment of crimes committed exclusively within the territory of the other" 31 Stat. 1818; T5242; 1 Malloy 1193.

The Constitution of the United States, Article VI provides:

> "This constitution, and the laws of the United States which shall be made, under the authority of the United States, shall be the Supreme Law of the Land."

It is, therefore, quite clear that if the situs of crimes alleged to have been committed by petitioner was in Mexico, then United States Courts are deprived of subject matter jurisdiction by virtue of the Extradition Treaty of 1899 regardless of what the general rule of law may be otherwise.

While such conventional legal research as is available to petitioner has not been productive on the political and historical reasons for this proviso; an examination of the case of A. K. Cutting as reported in the July and

and August, 1886, New York Times and the Report on Extraterritorial Crime and the Cutting case, 1887, Foreign Relations of United States, 757, indicates that this proviso arose out of the Cutting affair.

The July 1-December 31, 1886, New York Times Index at page 150 reflects the dates, pages, and columns of the articles covering the Cutting case. The gist of these articles was that tempers flared so between the Texans and the Mexicans as a result of this case that war was not only considered but Mexico actually reinforced its border garrisons and conducted maneuvers at the Rio Grande River near El Paso.

John Bassett Moore, as a Department of State officer prepared the then famous Report on Extraterritorial Crime and the Cutting Case; 1887 Foreign Rel. of United States, 757, in which he exhaustingly examined the subject matter and concluded Mexico did not have subject matter jurisdiction in the Cutting case. In that case, an American citizen, Cutting, was prosecuted and convicted in a Mexican Court, of libel committed in the publication of a newspaper in El Paso, Texas. The United States Government protested, and the Mexican Government asserted the propriety of the proceedings under Article 186 of the Mexican Penal Code, which provided that "penal offenses committed in a foreign country by a Mexican against Mexicans or foreigners, or by a foreigner against Mexicans, may be punished in the Republic," if they have not been tried elsewhere and if the accused is in the Republic voluntarily or as a result of extradition. Here the victim of the alleged libel was a Mexican national, and the accused Cutting had resided in Mexico "off and on" for eighteen months. The charge against Cutting was later amended to include libel committed in Mexico through the circulation in Mexico of the newspaper con-

taining the defamatory statements. During the course of the international controversy, the appellate court in Mexico ordered Cutting's release, on the grounds that the aggrieved Mexican had withdrawn his complaint, and that the term already served was sufficient to satisfy justice.

In his Annual Message to Congress, December 6, 1886, President Cleveland said of this case:

> "A sovereign has jurisdiction of offenses which take effect within his territory, although concocted or commenced outside of it; but the right is denied of any foreign sovereign to punish a citizen of the United States for an offense consummated on our soil in violation of our laws, even though the offense be against a subject or citizen of such sovereign. The Mexican statute in question makes the claim broadly, and the principle, if conceded, would create a dual responsibility in the citizen, and lead to inextricable confusion, destructive of that certainty in the law which is essential of liberty...
>
> Whatever the degree to which extraterritorial criminal jurisdiction may have been formerly allowed by consent and reciprocal agreement among certain of the European states, no such doctrine or practice was ever known to the laws of this country or of that form which our institutions have mainly been derived."[18]

[18] 1886 Foreign Rel. of U. S. viii; 2 Moore, International Law 221-232.

Consequently, within the framework of the present factual stiutation, the jurisdiction of the United States Court must depend upon the consummation of the crime within the United States. The offense must "take effect" within the United States.

This rule of law seems to obtain in the Ninth Circuit. See United States v. Rodriquez, 182 F Supp. 479 (1960) Aff. Sub. Nom. Rocha v. United States, 288 F. 2d 545 (CA 9, 1961). Rodriquez stated:

> "When the effect is felt by private persons within the state, penal sanctions rest on the "objective" or "subjective" territorial principal used in the Strassheim case." See Strassheim v. Daily, 221 U.S. 280 at 285.

Here however, if a fraud was perpetrated, its effect was felt or consummated in Mexico. Therefore, American Courts lack jurisdiction.

The English cases of Regina v. Brixton Prisoner Governor, ex parte Rush 1 All Eng. Rep. 316 [1969] and Board of Trade v. Owen, 1 All Eng. Rep. 411 [1957] shed light on the issue because of their similar factual patters.

In each of those cases a conspiracy was alleged which had as its object a fraud to be consummated or perpetrated outside the territorial jurisdiction of the English Courts. However, some overt preparatory acts were done in England.

The House of Lords, relying in part upon Dealy v. United States, 152 U.S. 539 found that English Courts lacked subject matter jurisdiction.

Dealy ruled at 547:

"If the conspiracy was entered into

> within the limits of the United States and the jurisdiction of the Court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere."

Thus, the situs of the conspiratorial agreement test; in this case, Mexico, determines that jurisdiction does not exist in American Courts by virtue of the treaty proviso.

Therefore, viewed either from the point of view of where the conspiratorial agreement was entered into or from the point of view of where the effect was felt, the locus delicti is Mexico and by virtue of this Extradition Treaty of 1889, United States Courts have no jurisdiction.

Judge Cardozo, in People v. Werblow, 241 N. Y. 55, 148 N. E. 786 at 789 said:

> "We think a crime is not committed either wholly or partly in this state, unless the act within this state is so related to the crime that if nothing more had followed, it would amount to an attempt."

Mims v. United States, 375 F. 2d 135 (1967) at 148 said:

> "Much ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparation ends and attempt begins" and Mims reflects upon the paucity of Federal cases on the subject.

However, as n. 41 in Mims points out, Gregg v. United States, 113 F. 2d 687, 690

(CA 8, 1940) follows Cardozo's opinion in Werblow, op. cit.

> "The Gregg case, at p. 690 of 113 F. 2d that test laid down by Cardozo, Jr. in the Werblow case, supra, note 40, "***The act must 'carry the project forward within dangerous proximity to the criminal end to be attained'. ***"
>
> "The Coplon case, at p. 633 of 185 F. 2d, quoted with approval the following from the opinon of Holmes, J. in the Peaslee case, supra, note 40: " 'Preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime.' "
>
> "In discussing the same question in the Kennedy case, supra, note 40, Holmes, J., said: "***Every question of proximity must be determined by its' own circumstances, and analogy is too imperfect to give much help. ***" "

Factually, it is clear that no acts rising to the dignity of an attempt took place within the United States and therefore the United States Courts lack subject matter jurisdiction by virtue of the proviso of Article III of the Extradition Treaty of 1899 between the United States

and Mexico.

II

THE RESULTS OF THE JURY TRIAL IN THE CIVIL ACTION INDICATE INEFFECTIVE ASSISTANCE OF COUNSEL.

On September 24, 1971, the jury in civil action 306322 returned its' verdict in favor of defendants Robert Blevins, et al. and against plaintiffs John C. Nacos and Shirley M. Nacos also known as Shirley M. Jahnson. Morris Jacobs, Dan Daniels and Etablissement Delami, a Liechtenstein Corporation had been non-suited at the close of the plaintiff's case.

In the civil action, the defendant testified. In the criminal action here on appeal, he did not testify. Petitioner wanted to testify but was not permitted to do so by his trial counsel.

Petitioner concedes that it is the rule rather than the exception that:

> "Tactical decisions will not be reviewed with the hindsight of an appellate court." See People v. Brooks, 64 Cal. 2d 130, 140; 48 Cal. Rptr. 879; 410 P. 2d 383; People v. Garrison, 246 Cal. App. 2d 343, 350-351; 54 Cal. Rptr. 731.

> "It is the rule and properly so that the defendant has the "burden or establishing his allegation, not as a matter of speculation, but as a demonstrable reality" People v. Reeves, 64 Cal. 2d 766, 774; 51 Cal. Rptr. 691, 415 P. 2d 35.

Applying careful scrutiny to this formidable obstacle we note:

First, "The fact of the matter is that a defendant who does not take the stand does not in reality enjoy any longer the presumption of innocence" Williams, The Trial of a Criminal Case, 29 NYS Bar Bull 36, 42 (1957) cited in Poe v. United States, 233 F. Supp. 173 at 177 (1964).

Second, "The importance the jury attaches to the accused's not taking the stand and denying his guilt cannot be over emphasized" Poe, Op. Cit. at 175.

Third, when the petitioner did take the stand and testify, the verdict was in his favor even though the same witnesses testified to essentially the same facts.

Consequently, it would seem that this presents the unusual case where the court does not have to speculate upon what might have been, but can properly distinquish the results obtained where the defendant did testify and where he did not.

Unlike United States v. Von Roeder and Gonzales, 435 F. 2d 1004 (1971) this petitioner did not discuss the right to testify or its' relative advisability on the record.

Petitioner contends important defense issues which could have been raised but were not, such as the fact he was in the hospital in San Diego undergoing surgery the time Hartley Bell claimed that he was in Tijuana, coupled with testimonial discrepancies in the civil trial lead irresistibly to the inescapable conclusion that he was ineffectively represented.

The disparity of result should be the "demonstrable reality" of Adams v. United States, exrel McCann, 317 U.S. 269, 281.

Therefore, crucial defenses, alibi due to hospitalization in one case, denial in others, were withdrawn from the case due to the failure of counsel to fully investigate all defenses of fact and law and thus petitioner did not receive

effective representation.

This should require reversal.

III

THE CONDUCT OF THE PROSECUTOR, IN INDICTING ALLEGED CO-DEFENDANTS WHO HE SHOULD HAVE KNOWN WERE NOT SUBJECT TO EXTRADITION NOR PROCESS TO APPEAR AT THE PETITIONER'S TRIAL BY REASON OF THE EXTRADITION TREATY OF 1899 DEPRIVED PETITIONER OF DUE PROCESS OF LAW WHERE IT APPEARS SUCH TACTIC WAS A DEVICE TO AVOID THE HEARSAY RULE BECAUSE IT EFFECTIVELY DEPRIVED PETITIONER OF HIS RIGHT TO CONFRONTATION.

A defendant in a criminal trial has the constitutional right to a prosecutor who acts within reasonable limits. Mooney v. Holohan, 294 U.S. 103; Alcorta v. Texas, 355 U.S. 28; Pyle v. Kansas, 317 U.S. 213.

The conduct of the prosecutor may deny the accused a fair trial and thus deny due process of law. See Berger v. United States, 295 U.S. 78.

In this case, the prosecutor well knew that neither Natividad nor Varela ever came within the territorial jurisdiction of the United States.

It is clear beyond peradventure that neither Natividad nor Varela would or could be compelled to attend the petitioner's trial.

But because they were co-defendants in this indictment, statements made by them came within the co-conspirator exception to the hearsay rule and were admitted, over objection against this petitioner.

This effectively denied petitioner's VI Amendment right to confrontation.

This prosecutorial tactic was fundamentally unfair and rendered the trial a sham because there was no way this petitioner could refute these alleged statements without taking the stand himself since all the percipient witnesses were out of the jurisdiction and not subject to process.

This forced petitioner to have to take the stand and thus give up his V Amendment right not to testify or obviously suffer conviction.

Thus petitioner could only refute the government's case by taking the stand--which his counsel declined to allow him to do.

Thus the jury trial aspects of the case was really reduced to a sham.

Once the motion for judgment of acquittal was denied it was legal suicide for this petitioner not to take the stand.

His counsel's not allowing him to do so denied petitioner of effective assistance of counsel.

Therefore, the prosecutorial tactics coupled with trial counsel's failure to recognize the necessity for the petitioner to take the stand reduced the trial to a farce and sham--insofar as its' presentation as a jury matter was concerned.

This case should be reversed.

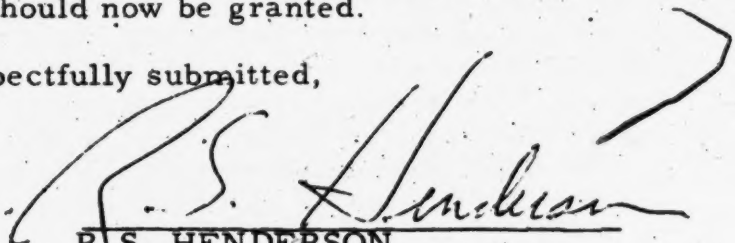
IV

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the petition for

certiorari previously filed, rehearing and certiorari should now be granted.

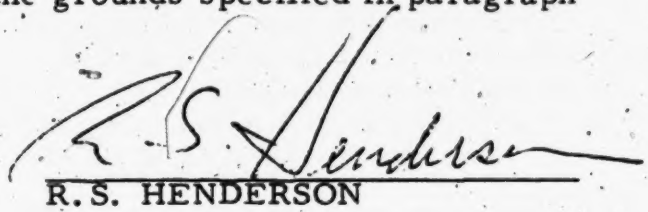
Respectfully submitted,



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San Diego, California 92101
Telephone: (714) 233-7561
Attorney for Petitioner

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.



R. S. HENDERSON
Attorney for Petitioner

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

Denise Wakeman, being first duly sworn, deposes and says:

That she is a citizen of the United States and that her business address is 1140 Union Street, Suite 204, San Diego, California 92101; that she is over the age of eighteen years, and not a party to the within action.

That on December 3, 1971 she deposited in the United States Mail, San Diego, California, in the within action NO. 70-119, ROBERT LEE BLEVINS v. UNITED STATES OF AMERICA, in an envelope bearing the requisite air mail postage, three copies of the PETITION FOR REHEARING OF ORDER DENYING CERTIORARI addressed to:

Erwin N. Griswold
Soliciter General
Beatrice Rosenberg
Thomas M. Lockney
Attorneys
Department of Justice
Wasington D. C. 20530

at which place there is a delivery service by United States mails from said post office.

Denise Wakeman
DENISE WAKEMAN

SUBSCRIBED AND SWORN to before me this 1st day of December, 1971.

R S Henderson
NOTARY PUBLIC in and for said county and state

OFFICIAL SEAL
RICHARD S. HENDERSON
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My Commission Expires Feb. 4, 1972

1140 Union Street, San Diego, Calif. 92101